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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ALETA BUSSELMAN, Plaintiff, v. BATTELLE MEMORIAL INSTITUTE, an Ohio nonprofit corporation, Defendant.	No. 4:18-cv-05109-SMJ DEFENDANT BATTELLE MEMORIAL INSTITUTE'S REPLY IN SUPPORT OF OMNIBUS MOTIONS *IN LIMINE* 11/21/2019 (Pretrial Conference) With Oral Argument 9:30 a.m.

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I. SUMMARY OF REPLY

Battelle respectfully requests that the Court grant as unopposed its Motions in Limine 1 and 5. Battelle also respectfully requests that the Court grant Battelle's Motions in Limine 2, 3, 4, 6, 7, 8, 9, 10, and 11 for the below-stated reasons.

II. BATTELLE'S REPLY REGARDING ITS MOTIONS *IN LIMINE*

1. The Court Should Exclude Non-Party Witnesses. (Fed. R. Evid. 615). ECF No. 161 at 9:16-10:9.

The Court should grant Battelle's unopposed Motion in Limine 1. *See* ECF No. 215 at 8:1-12. Although Plaintiff does not oppose Battelle's motion, she insinuates Battelle intends to "switch out its corporate designee so that the managers who are central to this case get to hear the testimony of other witnesses." *Id.* Plaintiff has no basis to suggest that Battelle intends to circumvent Rule 615, and the Court should not prohibit Battelle from substituting its corporate designee in the event its original designee falls ill or is otherwise unable to attend trial for a legitimate reason. 29 Victor J. Gold, *Fed. Prac. & Proc. Evid.* § 6245 (2d ed. 2019) ("switching representatives during the trial normally should be permitted if there is a legitimate reason to make the switch").

2. The Court Should Require Battelle's Witnesses to Appear Only Once. (Fed. R. Evid. 611). ECF No. 161 at 10:10-12:3.

The Court should grant Battelle's Motion in Limine 2 because Plaintiff's proposed order of proof will result in a waste of limited trial time and an unnecessarily burdensome imposition upon numerous witnesses. Battelle will not belabor this issue, which Battelle addressed in its Motion in Limine 2, ECF No. 161

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at 10:10-12:3, and in its response to Plaintiff's Omnibus Motion in Limine 1, ECF No. 209 at 3:3-5:8. Nevertheless, Battelle notes that Plaintiff fails to provide a practical justification for her request that the Court require 15 non-party witnesses to appear for examination twice,[1] including eight witnesses Plaintiff contends Battelle should be required to direct examine twice.[2] *See* ECF No. 215 at 8:13-11:2.

Despite Plaintiff's implicit assertion that her proposed order of proof reflects "the 'conventional' order of proof," it does not. ECF No. 215 at 8:15-9:8. Instead, Plaintiff's case in chief will apparently be comprised largely of her counsel's preemptive attempts to discredit Battelle's witnesses through cross-examination before Battelle calls them to testify on direct examination about who they are and what actually happened in this case. If the Court is inclined to permit Plaintiff to proceed in this unconventional and confusing fashion, Battelle requests that the Court exercise its broad discretion under Rule 611 and order that these 15 non-party witnesses need only appear once for examination, which will both expedite the trial

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[1] These are Iris Anderson, Stephanie Anderson, Marty Conger, Dr. Leesa Duckworth, Kevin Ensign, Mark Hadley, Peg Jarrett, Dr. John LaFemina, Jeff Leaumont, Donny Mendoza, Kathy Pryor, Connie Schliebe, Karla Smith, Mike Spradling, and Tammy Taylor. *Compare* ECF No. 154 at 2:2-5:17 *with* ECF No. 160 at 22:1-26:15.

[2] These are Iris Anderson, Marty Conger, Dr. Duckworth, Mr. Ensign, Dr. LaFemina, Mr. Leaumont, Mr. Spradling, and Ms. Taylor. ECF No. 175 at 3:16-4:19.

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and minimize the burden upon these witnesses. *See*, *e.g.*, 28 Victor J. Gold, *Fed. Prac. & Proc. Evid.* § 6164 (2d ed. 2016) ("The courts frequently have exercised their discretion under Rule 611(a) to permit deviations from this conventional order of proof where it can save time, avoid confusion and prejudice, or accommodate witnesses.").[3]

3. Plaintiff Should Be Prohibited From Testifying That She be Awarded a Specific Amount for Emotional Distress Damages. (Fed. R. Civ. P. 26(a)(1)(A)(iii); Fed. R. Civ. P. 37(c)(1)(C)). ECF No. 161 at 12:4-13:13.

Plaintiff's response fails to address the straightforward premise of Battelle's Motion in Limine 3, which the Court should grant. *Compare* ECF No. 161 at 12:4-13:13 *with* ECF No. 215 at 11:3-14:18. Plaintiff has simply never disclosed to Battelle the amount of her claimed emotional distress damages or any supporting computation. Fed. R. Civ. P. 26(a)(1)(A)(iii); ECF No. 217-2 at 3-6. Nevertheless, Plaintiff's counsel admittedly intends to "suggest a specific amount [of emotional distress damages] or present a range at closing argument . . . ." ECF No. 215 at 11:5-9. The Court should not permit Plaintiff to ignore Rule 26(a)(1)(A)(iii).

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[3] Plaintiff's quotation from *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 199 F.R.D. 487, 490 (E.D.N.Y. 2001) is incomplete. ECF No. 215 at 9:18-10:2. The complete quote is "***The formal Rules of evidence and procedure are in tension with the traditional practice, under common law, that*** a party's presentation of a case ought not to be unduly interrupted or distracted." *Blue Cross & Blue Shield*, 199 F.R.D. at 490 (emphasis added to omitted passage).

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Under Rule 26, Plaintiff could elect to either disclose to Battelle a sum and a supporting computation or, instead, let the jury decide the issue of damages without her or her counsel's suggestions. Plaintiff has elected the latter through her intentional nondisclosure. *See, e.g.*, *E.E.O.C. v. Wal-Mart Stores, Inc.*, 276 F.R.D. 637, 639-40 (E.D. Wash. 2011) ("[I]f Plaintiff intends to suggest a specific amount to the jury for emotional distress damages, yet fails to supplement its Rule 26 disclosures to provide Defendant with a computation of damages, Plaintiff may be foreclosed from suggesting that specific amount for emotional distress damages to the jury at trial"); *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 267 F.R.D. 257, 282-83 (D. Minn. 2007) ("to the extent that plaintiffs intend to suggest a specific amount to the jury for emotional distress damages, they shall . . . provide a calculation for compensatory damages in compliance with Rule 26(a)(1)(C) . . . . If plaintiffs do not provide this information . . . they will not be allowed to suggest a specific amount to the jury for emotional distress damages."); *E.E.O.C. v. Gen. Motors Corp.*, 2009 WL 910812, at *2 (S.D. Miss. Apr. 1, 2009) ("if the plaintiff intends to suggest a specific amount of emotional distress-related compensatory damages to the jury, he or she must produce the disclosures required by Rule 26. If, however, the plaintiff intends to leave the determination of emotional distress-related compensatory damages solely to the jury, a Rule 26 disclosure is not required.").

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4. The Court Should Prohibit Plaintiff From Testifying About Her Emotional Distress In Terms That Indicate a Mental Health or Medical Condition. (Fed. R. Evid. 403). ECF No. 161 at 13:14-15:3.

The Court should grant Battelle's Motion in Limine 4 because it would be unfairly prejudicial to permit Plaintiff to testify to the jury that she suffered severe emotional disturbance consonant with serious mental health diagnoses. Plaintiff's testimony should instead be limited to what Plaintiff's counsel previously outlined in his sworn declaration: "[Plaintiff's] non-medical emotional harm damages will be proved through testimony addressing her levels of stress, loss of enjoyment of life, humiliation, embarrassment, fear, anxiety, and anguish/grief, resulting from Defendant's retaliation, on a scale of 1 to 10." ECF No. 50 at 2:4-8.

Despite repeatedly making such representations to the Court, Plaintiff now opposes Battelle's request for an order barring her from testifying at trial that, among other things, she was: "emotionally destroyed (to the point of crying and throwing up all of the time) for months and months"; "so stressed out that [she] can't function in a normal social/intimate setting"; and reports feeling "triggered" by certain events.[4] *Compare* ECF No. 161 at 14:11-21 *with* ECF No. 215 at 15:1-19:10.

[4] Plaintiff's argument regarding Meriam-Webster's definition of "trigger" omits the relevant definition: "to cause an ***intense and usually negative emotional reaction*** in (someone) [Example:] Water had a way of *triggering* my brother and making

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According to Plaintiff, she should be permitted to offer such inflammatory testimony because, she contends, it is "the truth about [her] actual lived experience and the severity of her damages." ECF No. 215 at 15:9-13. Such gratuitous, uncorroborated, and unchallengeable testimony is a textbook example of what Rule 403 was intended to exclude. "Unfair prejudice means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *White v. Ford Motor Co.*, 500 F.3d 963, 977 (9th Cir. 2007). "The greatest danger included in the notion of 'unfair prejudice' is the injection of powerful emotional elements, brought by proof that is unnecessarily graphic or overwhelming in depicting . . . suffering, pain, [or] sorrow." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:13 (4th ed. 2019).

There is a high probability that such testimony from Plaintiff will evoke an emotional response among the jurors, who will infer (without competent evidence) that Plaintiff has one or more serious diagnosable mental health conditions attributable to Battelle. A jury presented with Plaintiff's uncorroborated testimony of purported emotional devastation will be inclined to ignore the compelling evidence supporting Battelle's defense and, instead, find for Plaintiff due to "the injection of powerful emotional elements, brought by proof that is unnecessarily graphic or overwhelming." Permitting Plaintiff to offer such inflammatory testimony would be particularly unfair in light of the Court's rulings that barred

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ordinary, everyday weather take a frightening turn for the worse." https://www.merriam-webster.com/dictionary/trigger (emphasis added).

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Battelle from obtaining admissible substantive evidence to rebut Plaintiff's assertions.

5. Plaintiff's "Emotional Harm Chart" Should Be Excluded as Inadmissible Hearsay. (Fed. R. Evid. 802). ECF No. 161 at 15:4-15:18.

Battelle's unopposed Motion in Limine 5 should be granted. *See* ECF No. 215 at 19:5-10.

6. The Court Should Exclude Evidence Regarding Former PNNL Employee Kim Anderson. (Fed. R. Civ. P. 402, 403, 404(b)(1)). ECF No. 161 at 15:18-17:16.

The Court should grant Battelle's Motion in Limine 6. Plaintiff's response demonstrates she intends to call Kim Anderson as a witness in order to put on a confusing "trial within a trial" regarding Mr. Anderson's uncorroborated claim that he was terminated for engaging in whistleblower activity. ECF No. 215 at 19:10-23:11. Plaintiff's response further demonstrates that her contemplated mini-trial has nothing to do with Plaintiff, Plaintiff's NDAA claim, Dr. LaFemina, the group in which Dr. LaFemina and Plaintiff both worked, cause analysis, or any related process at PNNL. *See id.* Moreover, a comparison of Plaintiff's response with Plaintiff's excerpts of Mr. Anderson's deposition testimony demonstrates that, as with Plaintiff's summary judgment submissions, Plaintiff continues to rely upon "misinterpretations of . . . deposition testimony." *Davis v. City of Seattle,* 2008 WL 202708, at *1 (W.D. Wash. Jan. 22, 2008). *Compare* ECF No. 215 at 19:10-23:11 *with* ECF No. 217-3. Even if Plaintiff had accurately represented Mr. Anderson's

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deposition testimony, Mr. Anderson's trial testimony would still be inadmissible for at least six independent reasons.

First, Mr. Anderson's contemplated testimony is irrelevant because it has nothing to do with Dr. LaFemina, who made the personnel decision Plaintiff challenges in this lawsuit. *Harris v. Wackenhut Servs., Inc.*, 2009 WL 10715688, at *2 (D.D.C. Aug. 14, 2009) ("the proffered evidence is likely irrelevant given that the plaintiff has not demonstrated any nexus between the proffered evidence and participation of the same decisionmakers in events also involving claims of racial discrimination").

Second, Plaintiff seeks to admit Mr. Anderson's testimony as character evidence that she falsely contends demonstrates an alleged institutional-level discriminatory animus toward self-proclaimed "whistleblowers" at PNNL. ECF No. 215 at 20:3-6. *But see U.S. v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."). However, Plaintiff has not met her burden of establishing its admissibility under Rule 404(b). *See Bailey*, 696 F.3d at 799 ("In the Ninth Circuit, a four-part test is used to determine the admissibility of evidence pursuant to Rule 404(b) . . . (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged") (citations omitted); *see also id.* at 802 ("In order for evidence of a prior accusation to be

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admissible, there must be sufficient, independent evidence (besides the accusation alone) to support a finding that the prior conduct occurred.").

Third, Plaintiff's introduction of Mr. Anderson's testimony would inevitably lead to a time wasting mini-trial because Battelle would have to call as rebuttal witnesses Mr. Anderson's former supervisors and coworkers to refute his self-serving and unfounded accusations against Battelle. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 7803893, at *2 (N.D. Cal. Nov. 15, 2016) ("One function of Rule 403 is to avoid the introduction of large quantities of extrinsic evidence to create mini-trials regarding tangentially related matters.").

Fourth, such an unnecessary and irrelevant digression will inevitably confuse the jury. *Bultena v. Washington State Dep't of Agric.*, 319 F. Supp. 3d 1215, 1221 (E.D. Wash. 2018) ("A jury would likely have difficulty understanding why they are being asked to evaluate the context and severity of conduct directed at individuals other than Bultena, who belong to classes to which Bultena does not, perpetrated by individuals other than Bultena's direct managers.").

Fifth, that inevitable jury confusion would be unfairly prejudicial to Battelle because the jurors "might think that they should 'punish' defendant for actions that did not involve plaintiff." *French v. Providence Everett Med. Ctr.*, 2009 WL 10676494, at *3 (W.D. Wash. Mar. 19, 2009); *accord E.E.O.C. v. OSI Rest. Partners, Inc.*, 2010 WL 11519258, at *4 (D. Ariz. July 6, 2010) ("Despite any limiting instruction, there is a high risk that the jury will misuse Mr. Gibson's and other non-class members' testimony by concluding that Mr. Rawson is the kind of

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person who harassed employees, so he must have harassed the class members. The jury may also conclude that Defendants are deserving of punishment for employing a person of bad character like Mr. Rawson.").

Finally, Plaintiff's case law citations do not support her position. Plaintiff cites *Santos v. Peralta Community College District*, 2009 WL 3809797, at *5 (N.D. Cal. Nov. 13, 2009). ECF No. 215 at 19:16-19. However, that court granted the defendant-employer's motion for summary judgment, explaining, "[Plaintiff] has failed to establish that there is a sufficient nexus between the alleged discrimination against her and the conclusory testimony of [non-party witness] about discrimination against Asian employees from which discrimination here may reasonably be inferred." *Id.* at *6. The court noted, "Given the lack of substantiality of [non-party witness's] evidence and the concern here that such evidence would require a trial within a trial, it is doubtful that this evidence would even be admitted." *Id.*

Also unhelpful is Plaintiff's citation to *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995). In *Heyne*, the court held that evidence regarding an ***individual supervisor's*** sexual harassment of other female employees was admissible in a Title VII case "to prove ***his*** motive or intent in discharging [the plaintiff]." *Id.* at 1480 (emphasis added). Here, *Heyne* is inapposite because Mr. Anderson's proposed testimony has nothing to do with Dr. LaFemina, and Plaintiff's claim is not for race or gender discrimination. Numerous courts—including the Ninth Circuit—have thus limited *Heyne's* import. *See, e.g.*, *Beachy v. Boise Cascade Corp.*, 191 F.3d

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1010, 1014 (9th Cir. 1999) ("there do not appear to be any reported cases extending the rule articulated in *Heyne* to such an amorphous group. All the reported cases in which evidence of other incidents was allowed involved evidence related to a group defined by clearly established parameters such as gender or race."); *Romero v. Cty. of Santa Clara*, 666 Fed. Appx. 609, 612 (9th Cir. 2016) (unpublished) ("Because the evidence at issue did not show SCVMC's hostility toward 'a group defined by clearly established parameters such as gender or race,' the district court could reasonably conclude that the testimony would be of limited probative value") (citing *Beachy*, 191 F.3d at 1014); *Schmitz v. City of Wilsonville*, 1999 WL 778586, at *7 (D. Or. Sept. 17, 1999) (distinguishing *Heyne* because "[plaintiff] wishes to admit evidence regarding actions by a former interim transit director against a different union member to prove that hostility existed between the City of Wilsonville and the union. Such evidence is irrelevant to [plaintiff's supervisor's] motivation and has no bearing on her independent decision to terminate [plaintiff]").

Similarly misplaced is Plaintiff's reliance upon *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). There, the Court held, "The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Id.* This is not an ADEA case and, in any event, Battelle has not advocated any *per se*

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rule of exclusion; instead, Mr. Anderson's testimony is inadmissible under the facts of this case as applied to Rules 402, 403, 404(b), and construing case law.

7. The Court Should Exclude Evidence Regarding Plaintiff's Uncorroborated Allegations of Past Retaliation, Harassment, and Discrimination. (Fed. R. Evid. 402, 403, 404(b)(1)). ECF No. 161 at 17:17-20:22.

The Court should grant Battelle's Motion in Limine 7. ***First***, Plaintiff does not oppose Battelle's motion to the extent it concerns "her report to Dr. LaFemina of two LGBT women employees." ECF No. 215 at 24:17-19.

Second, Plaintiff concedes her alleged "reporting of Jeff Deal and the retaliation she experienced as a result of that reporting" is not relevant. *See id.* at 23:14-16 (Plaintiff claiming it "is likely to be relevant"). Instead, Plaintiff contends her uncorroborated and baseless allegations that Mr. Deal is a "sexual harasser" who "retaliated" against Plaintiff will ***become*** relevant if Battelle questions Plaintiff at trial about a March 2, 2016 email exchange between Plaintiff and Dr. LaFemina in which Plaintiff stated she had applied for another position at PNNL because serving as the AIM Team Manager "is hard on me. I'm struggling . . . a lot." ECF No. 85-19 at 2-3; ECF No 174-3. According to Plaintiff, if Battelle questions her at trial about this email (which does not mention Mr. Deal), she should be permitted to testify regarding allegations she made about Mr. Deal in her previously filed declaration, but her argument makes no sense, and her allegations about Mr. Deal have nothing to do with this case. ECF No. 215 at 23:14-24:16. For example, Plaintiff's declaration states, "I DID NOT KNOW THAT JEFF DEAL WOULD BE IN THE INTERVIEW. He sexually harassed Sarah Timmons, I turned him in

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and he created a hostile work environment for both of us," ECF No. 134 at 47:15-21, "Clearly my disclosure of sexual harassment and hostile work environment was acceptable behavior by John [LaFemina]," ECF No. 134 at 48:11-15, and "I even said that to the sexual harasser [*i.e.*, Mr. Deal] in an e-mail," ECF No. 134 at 52:3-9. *See also* ECF No. 158 at 96:8-18; 97:5-98:10; 101:6-16; 102:18-103:18 (Battelle's requests to strike related portions of Plaintiff's declaration).

Although Plaintiff does not specifically invoke the doctrine—or otherwise cite any authority—she essentially contends that if Battelle questions her at trial regarding her March 2, 2016 email to Dr. LaFemina, Battelle will somehow "open the door" to Plaintiff's tarring of Mr. Deal and PNNL through Plaintiff's uncorroborated and unfounded testimony that Mr. Deal is a "sexual harasser" with whom she apparently refuses to work. While the logic supporting Plaintiff's contention is not apparent, she misunderstands the doctrine she obliquely invokes. "Under the rule of curative admissibility, or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission." *U.S. v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988) (citations omitted). "The doctrine does not permit the introduction of evidence that is related to a different issue or is irrelevant to the evidence previously admitted." *Id.*

Here, Plaintiff's invocation of this doctrine fails because her March 2, 2016 email to Dr. LaFemina—in which Plaintiff explained that she was struggling in her

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AIM Team Manager role and wanted to seek other opportunities at PNNL—is both relevant and admissible. Moreover, Plaintiff's testimony that, according to her, Mr. Deal is a "sexual harasser" with whom she apparently refuses to work is not necessary "to rebut any false impression that might have resulted from the earlier admission" of her March 2, 2016 email. Plaintiff's highly relevant email exchange with Dr. LaFemina, which does not mention Mr. Deal, is not misleading.

Even if Battelle's submission of that March 2, 2016 email as evidence and its related lines of questioning did somehow open the proverbial door, "[E]vidence cannot come through the open door if it is inadmissible even under the expanded realm of relevance opened by the adversary. As a corollary, opening the door does not deprive the trial court of the power to exclude evidence coming through it by an exercise of the discretion conferred by Rule 403." 21 Kenneth W. Graham, Jr., *Fed. Prac. & Proc. Evid.* § 5039.1 (2d ed. 2019); *accord U.S. v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007) ("the 'opening the door' doctrine is not so capacious as to allow the admission of any evidence made relevant by the opposing party's strategy, without regard to the Federal Rules of Evidence").[5] "The open door doctrine is supposed to prevent prejudice (not to introduce or exacerbate it), and it is often wise to limit or block attempts to offer rebuttal evidence." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:12 (4th ed. 2019); *accord*

[5] *See also Sine*, 493 F.3d at 1037 n. 17 ("The Federal Rules of Evidence's 'principle of completeness' also does not allow the admission of otherwise inadmissible statements.") (citations omitted).

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U.S. v. Johnson, 502 F.2d 1373, 1376 (7th Cir. 1974) ("The doctrine of curative admissibility can, of course, only be used to prevent prejudice; it cannot be 'subverted into a rule for injection of prejudice.'") (citations omitted).

Plaintiff's testimony that Mr. Deal is a "sexual harasser" with whom she refuses to work is irrelevant to Plaintiff's NDAA claim. Mr. Deal was not Plaintiff's manager during any time relevant to this action and played no role in the personnel decision at issue. Fed. R. Evid. 401. Moreover, Plaintiff's contemplated testimony is inadmissible character evidence under Rule 404. *See Harris*, 2009 WL 10715688, at *2 ("[T]he proffered evidence does not possess inherent value other than the inadmissible purpose of showing the defendant's alleged propensity to engage in similar acts. . . and therefore the jury cannot be asked to infer that a general discriminatory culture, if any can be shown, is imputable onto the decisionmakers identified in this case."). Finally, Plaintiff's proposed testimony would be confusing and unfairly prejudicial. *OSI Rest. Partners*, 2010 WL 11519258, at *4 ("The jury may also conclude that Defendants are deserving of punishment for employing a person of bad character like Mr. Rawson."). Permitting Plaintiff to tar Mr. Deal as a "sexual harasser" will also give rise to a time-wasting mini-trial, as Battelle vehemently denies the allegation and would have to call rebuttal witnesses to refute Plaintiff's baseless allegations against Mr. Deal. Fed. R. Evid. 403.

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8. The Court Should Prohibit Plaintiff from Offering Evidence Regarding the Reputation of PNNL Managers or PNNL, Generally. ECF No. 161 at 21:1-22:5.

The Court should grant Battelle's Motion in Limine 8, and Plaintiff should be required to try this case on the facts instead of relying upon her inadmissible and unsubstantiated attacks upon the characters of former Battelle employees and PNNL itself. Rather than concede the obvious point that Plaintiff's contemplated testimony is inadmissible, Plaintiff raises a host of arguments in an attempt to preserve her ability to tar the reputations of Mr. Conger, the late Ms. Doyle, and PNNL. However, each of Plaintiff's arguments fails.

First, Plaintiff incorrectly contends Battelle's motion "is premature" and "lacks adequate specificity." ECF No. 215 at 25:8-12. Not so. Battelle's motion offers three concrete examples of the unsubstantiated and inadmissible character evidence Plaintiff intends to offer at trial. ECF No. 161 at 21:3-10 ("Marty Conger has a reputation for bad behavior"; the late Ms. Doyle was "a dishonest person without integrity"; and "[Plaintiff has] seen corruption in this laboratory").

Second, Plaintiff asserts that at trial "Battelle/PNNL witnesses may be impeached by evidence of "bias, inconsistent statements, and contradiction." ECF No. 215 at 25:1-7. However, none of Battelle's cited examples of Plaintiff's contemplated trial testimony concern bias, inconsistent statements, or contradiction and there is no hypothetical scenario under which Plaintiff's contemplated testimony could implicate these methods of impeachment.

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Third, Plaintiff argues, "Reputation of course is admissible impeachment [under] Fed. R. Evid. 608." ECF No. 215 at 25:7. Plaintiff misunderstands Rule 608's scope:

> The admissibility of evidence under subdivision (a) is expressly made subject to two limitations, the first of which states that the evidence ***may refer only to 'character for truthfulness or untruthfulness.'*** Thus, opinion or reputation testimony pertaining to any other character trait is, by implication, inadmissible on the issue of witness credibility. This means that testimony concerning related character traits, such as 'honesty', or testimony concerning the general moral character of the witness, will be excluded.

28 Victor J. Gold, *Fed. Prac. & Proc. Evid.* § 6115 (2d ed. 2019) (emphasis added); *accord Flythe v. D.C.*, 4 F. Supp. 3d 222, 232 n. 5 (D.D.C. 2014) ("In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, *rather than allowing evidence as to character generally.*") (quoting Advisory Committee Notes Fed. R. Evid. 608(a)) (emphasis in original).

Fourth, Plaintiff erroneously contends she may offer the purported out-of-court statement of "Battelle/PNNL Employee Concerns Specialist (Marnae Litke Collins)" that "Marty Conger has a reputation for bad behavior at the Laboratory"—which Plaintiff alleges Ms. Collins said *after* the events giving rise to this case to demonstrate Plaintiff had a "reasonable belief" for purposes of the NDAA.[6] ECF

[6] Ms. Collins's purported out-of-court statement is inadmissible hearsay because it would not have been made within the scope of her employment. Fed. R. Evid. 801(d)(1)(2)(D). Ms. Collins's purported statement is also inadmissible reputation evidence because it does not concern Mr. Conger's "character for truthfulness or untruthfulness." Fed. R. Evid. 608(a).

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No. 215 at 26:14-27:14. Plaintiff's argument that the nature of her cause of action excuses her from complying with the Federal Rules of Evidence is without merit. "[Fed. R. Evid.] 1101(b) provides that the Evidence Rules apply generally 'to civil actions and proceedings, including admiralty and maritime cases.' This implements the decision of the drafters to create a uniform set of evidence principles to govern all types of civil matters." 31 Victor J. Gold, *Fed. Prac. & Proc. Evid.* § 8075 (1st ed. 2019). Plaintiff must support her claim with admissible evidence.

Fifth, Plaintiff apparently contends she should be permitted to testify at trial that the late Ms. Doyle was, according to Plaintiff, "a dishonest person without integrity" because, Plaintiff argues, "it is a fair explanation of why she was removed from her job." ECF No. 215 at 27:15-28:9. Questions of decorum aside, if Plaintiff wishes to offer at trial opinion or reputation testimony regarding the deceased Ms. Doyle's character for truthfulness or untruthfulness (but not "integrity"), she should only be permitted to do so pursuant to Rule 608's procedural and substantive requirements. The Federal Rules of Evidence do not permit Plaintiff to assert to the jury that the late Ms. Doyle was "a dishonest person without integrity," as Plaintiff apparently intends to do. Moreover, Plaintiff's maligning of her deceased former colleague in this fashion would also be unfairly prejudicial. Fed. R. Evid. 403.

Sixth, Plaintiff incorrectly argues she should be permitted to testify to the jury, "I've seen corruption at the laboratory" because, according to Plaintiff, it would "clearly [be] a reference to the matter she blew the whistle on and for which she claims she was retaliated against." ECF No. 215 at 28:10-29:41. Accepting for

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argument's sake Plaintiff's characterization of her contemplated testimony, permitting Plaintiff to characterize the innocuous events at issue in this lawsuit as "corruption" would be unfairly prejudicial to Battelle. Indeed, courts have excluded such inflammatory language in cases that actually concerned criminal charges of public corruption. *E.g.*, *U.S. v. Dimora*, 843 F. Supp. 2d 799, 847 (N.D. Ohio 2012) ("[R]eferring to Dimora as the 'corrupt commissioner,' may be gratuitously inflammatory, especially when alternative and less inflammatory means of summarizing the government's position are available. Further, describing him as 'corrupt' tends to suggest guilt in a conclusory fashion without reference to the elements of the crime charged. Therefore, the Court will not permit counsel for the government to use the phrase 'corrupt commissioner' at trial.").

9. The Court Should Prohibit Plaintiff From Using the Phrase "Hostile Work Environment." (Fed. R. Evid. 403, 701). ECF No. 161 at 22:6-23:15.

The Court should grant Battelle's Motion in Limine 9 because Plaintiff will be able to convey to the jury "the 'tension' in her relationship with Cindy Doyle" without using terminology charged with legal significance, such as "hostile work environment," "hostile environment," and permutations of the same. *Compare* ECF No. 161 at 22:6-23:15 *with* ECF No. 215 at 29:5-30:10. For example, instead of using conclusory appellations such as "hostile behavior" and "hostile work environment," Plaintiff should be required to ***describe*** the late Ms. Doyle's alleged behaviors that Plaintiff would apparently prefer to describe in conclusory fashion using legally charged terminology. *See* Fed. R. Evid. 602; *U.S. v. Evans*, 484 F.2d

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1178, 1181 (2d Cir. 1973) ("what the witness represents as his knowledge must be an impression derived from the exercise of his own senses") (citations omitted).

As Plaintiff notes, the elements of her NDAA claim "do no concern 'hostile' behavior or the existence of a 'hostile work environment.'" ECF No. 215 at 30:7-10. Therefore, Plaintiff's utilization of such charged terminology is unnecessary and will only confuse the jurors. Fed. R. Evid. 403. *See DataTreasury Corp. v. Wells Fargo & Co.*, 2010 WL 11538713, at *8 (E.D. Tex. Feb. 26, 2010) (granting similar motion in limine in patent infringement case, requiring "[a]ny party seeking to introduce evidence of Plaintiff's 'hostile work environment' [to] first approach the bench and establish a foundation for relevance and for why any probative value is not substantially outweighed by any danger of unfair prejudice").

10. The Court Should Exclude Evidence Regarding Plaintiff's Allegations of Subsequent Retaliation at PNNL. (Fed. R. Civ. P. 12(b)(1); Fed. R. Evid. 402, 403, 404(b)(1), 602). ECF No. 161 at 23:16-27:20.

The Court should grant Battelle's Motion in Limine 10 lest Plaintiff's unexhausted and unsubstantiated allegations of ongoing "retaliation"—over which the Court does not possess subject matter jurisdiction—infect the trial record. As stated in Battelle's motion, it appears that every federal district court to address the issue has held that federal whistleblower statutes require complainants to administratively exhaust allegations of subsequent retaliation prior to raising those same allegations in court. *See Roganti v. Metro. Life Ins. Co.*, 2012 WL 2324476, at *5 (S.D.N.Y. June 18, 2012); *Portes v. Wyeth Pharm., Inc.*, 2007 WL 2363356, at *6 (S.D.N.Y. Aug. 20, 2007); *Willis v. Vie Fin. Grp., Inc.*, 2004 WL 1774575, at

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*1 (E.D. Pa. Aug. 6, 2004). The U.S. Department of Labor, which administers SOX and to which Plaintiff has repeatedly asked this Court to defer, also adopted this rule for administrative proceedings. *In the Matter of: William Messer, Complainant v. John Elway Dodge, Respondent*, 2007 WL 7135746 (U.S. Dept. of Labor SAROX), 28. Indeed, Plaintiff does not cite to a single judicial or administrative decision that has held to the contrary. *See* ECF No. 215 at 30:11-38:10.

Yet Plaintiff nevertheless intends to testify at trial that she was subjected to various alleged acts of retaliation that were not raised in either her June 21, 2017 administrative complaint to the DOE, ECF No. 217-4, or in her virtually identical Complaint filed in this action, ECF No. 1. These include Plaintiff's following unexhausted and unfounded allegations:

> "6. Delay in obtaining cause analyst qualification meeting";
>
> "7. Never assigned to work as root cause analyst";
>
> "8. Cindy Doyle had full access to Ms. Busselman's past performance reviews, and she deleted her 2017 goals for next year's performance";
>
> "9. On May 24, 2017, after telling Dr. LaFemina that she went to employee concerns to complain about being removed, she was selected to have a drug test";[7]
>
> "10. After being assigned the windowless office, when working from home, Ms. Busselman's email file regarding Mr. Cooke was deleted from her email account"; and

[7] Plaintiff concedes this allegation should be excluded. ECF No. 215 at 38:8-10.

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> "11. In March 2018, Ms. Busselman applied for a manager position within Dr. LaFemina's organization and soon thereafter the opportunity was withdrawn."

ECF No. 133 at 18:5-19:33 (citations omitted). Plaintiff does not explain why she did not bring these new allegations to the DOE's attention either during the pendency of her administrative complaint or after the agency issued its July 5, 2018 determination that her NDAA claim is without merit. ECF No. 16 at 10-33 (DOE OIG's Investigative Report to Management); *see also* 41 U.S.C. § 4712(b)(4) (NDAA's three-year statute of limitations to file administrative complaint).

Nevertheless, Plaintiff's arguments in opposition to Battelle's motion fail. ***First***, Plaintiff cites to *Wallace v. Tesoro Corporation*, 796 F.3d 468 (5th Cir. 2015) and *Jones v. Southpeak Interactive Corporation of Delaware*, 777 F.3d 658 (4th Cir. 2015) for the proposition that the scope of a judicial action related to a SOX administrative complaint "is limited to the sweep of . . . investigation that can reasonably be expected to ensue from the administrative complaint." ECF No. 215 at 30:17-31:7. However, unlike the cases Battelle cites, neither *Wallace* nor *Jones* addressed whether allegations of subsequent retaliation must be administratively exhausted. Instead, *Wallace* addressed the question of whether the plaintiff could pursue in his judicial action allegedly protected activity omitted from his administrative complaint. *See* 796 F.3d at 477 ("By failing entirely to reference a distinct category of protected activity in his OSHA complaint, Wallace did not file a complaint whose investigation would reach that activity.").

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Similarly, *Jones* addressed the question of whether individuals not named as respondents in an administrative complaint could be named as defendants in a subsequent judicial action. 777 F.3d 658, 669–70 ("[T]he OSHA complaint plainly identifies Mroz and Phillips as 'person(s) who are alleged to have violated the Act (who the complaint is being filed against).' Nothing more precise is required.") (citations omitted). In any event, even if this Court accepts the Title VII concepts from *Wallace* and *Jones* regarding these entirely different issues, the Court should still grant Battelle's motion because Plaintiff's new allegations of supposed retaliation are not within "the sweep of . . . investigation that can reasonably be expected to ensue from [her] administrative complaint." Indeed, the DOE OIG's 23-page investigative report summarizes at length the agency's investigatory interviews with Plaintiff, yet that report does not contain a single reference to Plaintiff's new allegations of supposed retaliation. *See generally* ECF No. 16 at 9-33.

Second, Plaintiff contends Battelle's motion is a "bald assertion that the jurisdictional nature of the NDAA requires excluding related acts that occurred after the charge is filed" although Plaintiff "agrees that '[l]ater allegations that are of a drastically different type from those contained in the complaint may not, consistent with due process, be considered in the instant case.'" ECF No. 215 at 31:8-12 (*quoting Messer*, 2007 WL 7135746, 28). Battelle's motion is hardly a "bald assertion," as Plaintiff's response conspicuously omits passages that bookend the language she quoted from *Messer*: **(1)** "The exhaustion requirement of the

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whistleblower provision of the Sarbanes-Oxley Act precludes recovery for a discrete act of retaliation that arose after the filing of the administrative complaint which was never presented to OSHA for investigation"; and **(2)** "Accordingly, to the extent that any later allegations constitute distinct acts of retaliation, the complainant must file a new complaint with OSHA raising those allegations." *Messer*, 2007 WL 7135746, 29 (citing *Willis*, 2004 WL 1774575; *Reines v. Venture Bank and Venture Financial Group*, 2005-SOX-112 at 49 n.15 (ALJ Mar. 13, 2007); and *Kingoff v. Maxim Group LLC*, 2004-SOX-57, slip op. at 4 (July 21, 2004)).

Third, Plaintiff cites to a litany of Title VII cases for the proposition that her "civil suit may 'include acts of discrimination that occur *after* the charge is filed.'" ECF No. 215 at 31:18-33:12 (citations omitted). However, Plaintiff's cited Title VII cases are not persuasive on this point because "[t]he administrative scheme underlying [federal whistleblower statutes are] judicial in nature and [are] designed to resolve the controversy on its merits, as opposed to the administrative procedures underlying Title VII. [] The purpose of permitting subsequent, unexhausted Title VII claims to proceed was to foster informal conciliation." *Willis, Inc.*, 2004 WL 1774575, at *5–6. Conversely, permitting Plaintiff to advance unexhausted retaliation claims in this case would "bypass[] Congress's carefully constructed scheme [and] frustrate the congressional intent that whistleblower claims be resolved at the agency level, if possible." *Tamosaitis v. URS Inc.*, 781 F.3d 468, 477-78 (9th Cir. 2015).

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Fourth, Plaintiff incorrectly contends her newly asserted allegations of subsequent retaliation are evidence of damages as opposed to liability. ECF No. 215 at 35:14-16. This argument is illogical because alleged acts of retaliation only make sense as liability events from which claimed compensatory damages (*i.e.*, emotional distress) may theoretically flow. Indeed, the NDAA sets forth in entirely separate statutory sections potentially actionable liability events ("discharged, demoted, or otherwise discriminated against"), 41 U.S.C. § 4712(a)(1), and recoverable categories of damages ("compensatory damages (including back pay)"), 41 U.S.C. § 4712(c)(1)(B). That is presumably why Plaintiff's response to Battelle's pending Motion for Summary Judgment framed these new and unfounded allegations of retaliation as liability events and not as damages: "The defense brief does not discuss or defend any adverse actions listed above aside from the removal from her job, so summary judgment should be denied without further ado as to the rest." ECF No. 133 at 19:9-11.

Fifth, Plaintiff erroneously argues her "testimony that her emails with Steve Cooke were deleted from her account" is admissible "to show that Defendant understood the conduct Ms. Busselman opposed was unlawful." ECF No. 215 at 36:14-37:5. Notwithstanding that Plaintiff has never presented any competent evidence supporting this allegation—much less identified a single email she claims was "deleted"—her cited authority does not support her assertion that such allegations are not subject to administrative exhaustion. Plaintiff cites to *Phillips v. Potter*, 2009 WL 2588830, at *2 (W.D. Pa. Aug. 19, 2009), a Title VII case in

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which the Court ruled, "[T]he introduction of the alleged destruction would serve no relevant purpose at trial. Therefore, Defendant's Motion with regard to the alleged destruction of emails and other documents is granted." That does not support Plaintiff's contention. Plaintiff also cites to *Perez v. U.S. Postal Service*, 76 F. Supp. 3d 1168, 1197 (W.D. Wash. 2015), but that opinion does not address administrative exhaustion. Instead, it addresses evidence presented during a bench trial, which demonstrated, "[S]upervisors were undoubtedly aware of the wrongfulness of their conduct, instructing recipients of harassing emails to delete them." *Id.* There is no such evidence in this case, only Plaintiff's uncorroborated and unexhausted allegations, which the Court should exclude at trial.

11. The Court Should Exclude Plaintiff from Offering into Evidence or Otherwise Referencing Irrelevant Department of Energy Regulations, Policies, and Orders She has Identified as Trial Exhibits. (Fed. R. Evid. 403, 701). ECF No. 161 at 28:1-19.

The Court should grant Battelle's Motion in Limine 11 because the Court should not allow Plaintiff to confuse the jurors with the same tactic she employed in her summary judgment opposition materials. Fed. R. Evid. 403. Specifically, Plaintiff's opposition submissions included literal reams of DOE regulations, policies, orders, and contract materials, including many to which she never cited. *See* ECF Nos. 136-6, 136-20, 136-21, 136-22, 136-23, 136-24, 136-26, 136-27, 136-28, 136-29, 136-30, 137-24. Vaguely alluding to these hundreds of pages of documents, Plaintiff erroneously represented to the Court, "There is a myriad of established policies, procedures, regulations, and contract terms that . . . prohibit[ed] the manipulative actions of management in changing the March 2017

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root cause statement." ECF No. 133 at 7:9-13. However, to this day Plaintiff has not identified a single provision in these voluminous DOE materials that actually or arguably prohibited Mr. Cooke and Mr. Conger from offering to Ms. Pryor for her consideration proposed revisions to the root cause statements (after both Plaintiff and Ms. Pryor agreed they could do so).

Plaintiff's arguments in opposition to Battelle's motion in limine each fail. ***First***, Plaintiff argues Battelle has not identified "any specific trial exhibit, DOE regulation, policy or order that it argues is irrelevant." ECF No. 215 at 38:13-18. However, Battelle's motion clearly referred to ***all*** such materials Plaintiff listed as proposed trial exhibits. *See* ECF No. 161 at 28:3-6 (citing ECF No. 153). Lest there be any confusion, Plaintiff's trial exhibits at issue are Exhibits 20, 28, 30, 31, 32, 33, 34, 35, 36, 37, 57, 58, 68, and 99. ECF Nos. 171-15, 171-23, 171-25 through 171-32, 171-50, 171-51, 171-59, 171-84.

Second, Plaintiff incorrectly asserts that Battelle "includes no argument as to why any given DOE regulation, policy or order identified by the plaintiff is inapplicable or irrelevant." ECF No. 215 at 39:1-9. However, Battelle does not carry the burden of parsing though Plaintiff's voluminous submission to contend at length why each of them is irrelevant. Instead, the burden is upon ***Plaintiff*** to establish that they are relevant to her NDAA claim: "[I]t is the proponent's burden to demonstrate the relevancy of proffered evidence." *DesRosiers v. Moran*, 949 F.2d 15, 23 (1st Cir. 1991) (citations omitted); *accord U.S. v. Conners*, 825 F.2d

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1384, 1390 (9th Cir. 1987) ("the government must carry the burden of showing how the proffered evidence is relevant to one or more issues in the case").

Third, Plaintiff has not met her burden of establishing the relevance of any of these 14 Exhibits. Instead, Plaintiff asserts without any factual support that her proposed trial exhibits include "a guidance document [that] lies at the heart of the AIM team's finding that management failed to adopt adequate internal controls to prevent the vendor fraud." ECF No. 215 at 39:12-16. However, Plaintiff's NDAA claim does not concern ***how*** the Fowler Fraud cause analysis team (which did not include Plaintiff) reached its substantive conclusions in the Fowler Fraud Report, which conclusions were never substantively altered. Instead, Plaintiff's claim concerns her still unsubstantiated allegation that some unspecified policy, procedure, law, rule, or regulation prohibited Mr. Cooke and Mr. Conger from offering Ms. Pryor proposed root cause statement revisions for her consideration. Even if the "guidance document" to which Plaintiff refers was somehow marginally relevant to that issue, it should still be excluded because of the high probability its admission at trial will confuse the jury and waste limited trial time. Fed. R. Evid. 403.

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DATED this 15th day of October, 2019.

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I hereby certify that on the 15th day of October, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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